No. 82-1273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF MAINE, *Petitioner*

v.

RICHARD THORNTON, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

REPLY BRIEF FOR PETITIONER

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I. THE MAINE SUPREME JUDICIAL COURT'S JUDGMENT IN *STATE V. THORNTON*, 453 A.2d 489 (Me. 1982), DOES NOT REST UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondent urges this Court to dismiss the present case on the ground that the Maine Supreme Judicial Court's judgment in *State v. Thornton*, 453 A.2d 489 (Me. 1982), rests upon "adequate and independent" state grounds. (Brief for Respondent at 12-17). Petitioner addressed this issue in its Brief (Brief for Petitioner at 16 n.5), noting that the Maine Court's decision in *Thornton* is concerned exclusively with the scope of federal Fourth Amendment protection under *Katz v. United States*, 389 U.S. 347 (1967), and does not cite or purport to interpret in any way the state constitutional provision on search and seizure (Me. Const. art. I, § 5). The "plain statement" rule recently articulated in *Michigan v. Long*, 103 S.Ct. 3469, 3476 & n.7 (1983)—about six weeks after the filing of Petitioner's Brief—supports Petitioner's position that this Court should assert jurisdiction in the present case.

In *Michigan v. Long*, this Court set forth a uniform approach for determining whether a state court decision rests upon adequate and independent state grounds:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain state-

ment in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

....

... [I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, see *Abie State Bank v. Bryan, supra*, 282 U.S., at 773, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Michigan v. Long, 103 S.Ct. at 3476-77 (footnote omitted).

Applying this framework to the decision below leads to the conclusion that the Maine Court's opinion does not rest upon an adequate and independent state ground. As mentioned above, *Thornton* constitutes an application of *Katz*'s "reasonable expectation of privacy" test and does not even cite the state constitutional provision on search and seizure (Me. Const. art. I, § 5), nor is there any reference to any state constitutional provision or statute.[1]

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[1] *Florida v. Casal*, 103 S.Ct. 3100 (1983), discussed by Respondent in support of his position that *Thornton* is based on state law (Brief for Respondent at 14), is distinguishable from the instant case because there the Florida Supreme Court, although not expressly declaring that its holding rested on state grounds, did expressly analyze the legality of the officer's search in light of Florida statutory law—Fla. Stat. § 371.58 (1974) (renumbered at § 327.56 (Supp. 1983)). *State v. Casal*, Fla., 410 So.2d 152 (1982).

Admittedly, statements in *Thornton* that "the suppression justice applied *the law of the State* and found inapplicable the 'open fields' exception to the warrant requirement" and "[*i*]*n Maine*, for the 'open fields' doctrine to apply, two factual aspects of the circumstances must be considered: (1) the openness with which the activity is pursued,... and (2) the lawfulness of the officers' presence during their observations of what is open and patent...." (*Thornton*, 453 A.2d at 495; Pet. App. A20-A21 (emphasis added)) suggest the possibility that the Maine Court was applying, pursuant to state law, a distinctly Maine version of *Hester*'s "open fields" doctrine (see Brief for Petitioner at 16 n.5). However, these references to "Maine" law do not constitute a plain statement that the *Thornton* decision is in fact based on bona fide separate, adequate, and independent state grounds. Indeed, *Thornton*'s two "Maine" prerequisites for applying the "open fields" doctrine represent an express reconciliation of *Hester* with *Katz*'s "reasonable expectation of privacy" test for applying Fourth Amendment protections. Illustrative of this point are the following sentences in *Thornton* itself:

> Although an activity may be observed, because, for example, it is conducted outside, the participants may still have, as in this case, an expectation of privacy. *Katz*, 389 U.S. at 351-52, 88 S.Ct. at 511, 19 L.Ed.2d at 582. Under such circumstances, the State must demonstrate the legitimacy of the officers' position of observation [prerequisite "2"] and the openness of the conduct [prerequisite "1"] in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. In the circumstances of this case, the State can demonstrate neither requirement for the application of the open fields doctrine....
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> Although separated by forty-three years, the *Hes-*

> *ter* doctrine and the *Katz* doctrine can be reconciled; indeed, such reconciliation is required. *Dow*, 392 A. 2d at 536; *State v. Brady*, 379 So.2d 1294, 1295 (Fla. 1980) ("*Katz* did not rule out the open fields of *Hester* altogether"). Under both analyses, the reasonableness of any subjective expectation of privacy would be questioned: "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out." *Brady*, 379 So.2d at 1295.

453 A.2d at 495-96; Pet. App. A22-A23, A24. Thus, in promulgating and applying its two prerequisites for the application of *Hester*'s "open fields" doctrine the Maine Court was relying on its understanding of *Katz*'s "reasonable expectation of privacy" test. Moreover, the three cases cited in *Thornton* (453 A.2d at 495; Pet. App. A21-A22) as authority for "Maine's" two prerequisites—*State v. Peakes*, 440 A.2d 350 (Me. 1982), *State v. Dow*, 392 A.2d 532 (Me. 1978), and *State v. Stone*, 294 A.2d 683 (Me. 1972)—address the scope of federal Fourth Amendment protection, especially in the wake of *Katz*, and are not based in any way upon the state constitution or any state law (see Brief for Petitioner at 16 n.5). Hence, these three cases do not constitute a separate, adequate, and independent state law ground for the *Thornton* decision.[2] Furthermore, nowhere in *Thornton* is there a plain

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[2] In *Michigan v. Long*, this Court stated that "we do not wish to continue to decide issues of state law that go beyond the opinion that we review..." (103 S.Ct. at 3476), i.e., that the adequacy and independence of an alleged state law ground should be apparent "from the four corners of the opinion" (103 S.Ct. at 3475). From the face of the *Thornton* decision—without going beyond the opinion to examine *Peakes*, *Dow*, and *Stone*—it is apparent that the Maine Court's two prerequisites for application of the "open fields" doctrine are *not* based on an independent state source and constitute the Maine Court's solution for reconciling one federal Fourth Amendment doctrine (*Katz*'s "reasonable expectation of privacy" test) with yet another (*Hester*'s "open fields" doctrine). If this Court should decide, however, that the present case is one where Maine case law should be

statement that *Katz* and *Hester* "are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 103 S.Ct. at 3476. Finally, the Maine Court's string-citation of a number of Maine cases on search and seizure does not undermine the conclusion that the *Thornton* decision is based on federal law because all of these Maine cases are expressly cited as being in accord with *Katz* and virtually all are *Katz* progeny. (*Thornton*, 453 A.2d at 493-94; Pet. App. A14-A18). Since the *Thornton* opinion itself does not state that the Maine Court relied upon an adequate and independent state ground and, moreover, appears to rest exclusively on federal law, this Court must decide that it has, and should assert, jurisdiction in this case. *Michigan v. Long*, 103 S.Ct. at 3476-77.

II. IN TERMS OF *KATZ*, *HESTER*'S "OPEN FIELDS" DOCTRINE SHOULD BE A BRIGHT-LINE RULE THAT ANY SUBJECTIVE EXPECTATION OF PRIVACY IN FIELDS OR WOODS—EVEN THOSE THAT ARE FENCED, POSTED, AND SECLUDED—IS UNREASONABLE *PER SE*.

The need for a bright-line rule concerning the applicabil-

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examined to determine the adequacy of the alleged state ground of decision (see *Michigan v. Long*, 103 S.Ct. at 3476 & n.6), then such an examination would reveal that *Peakes*, *Dow*, and *Stone* are simply state court interpretations of federal law. Moreover, the remedy employed by the Maine Court in *Thornton*—i.e., the exclusionary rule—is further indication of the federal basis of the *Thornton* decision as the Maine Court has repeatedly stated that under Maine law there is no exclusionary rule for illegal or unreasonable searches and seizures. *E.g.*, *State v. Stone*, 294 A.2d 683, 693 n. 15 (Me. 1972); *State v. Haukins*, 261 A.2d 255, 258 n.3 (Me. 1970); *State v. Schoppe*, 113 Me. 10, 15, 92 A. 867 (1915); *State v. Burroughs*, 72 Me. 479, 480-81 (1881); *see also State v. Bouchles*, 457 A. 2d 798, 801 n. 4 (Me. 1983); *State v. Patten*, 457 A.2d 806, 811 (Me. 1983).

ity of the "open fields" doctrine of *Hester v. United States*, 265 U.S. 57 (1924), in the wake of *Katz v. United States*, 389 U.S. 347 (1967), is illustrated by both cases now before this Court—*State v. Thornton*, 453 A.2d 489 (Me. 1982) and *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982)—which present conflicting holdings on nearly identical facts.[3] Moreover, since the filing of Petitioner's Brief, this Court has expressed in several Fourth Amendment decisions a preference for search-and-seizure rules that can be applied consistently and predictably by law enforcement officers. *Illinois v. Andreas*, 103 S.Ct. 3319, 3324 (1983); *Illinois v. Lafayette*, 103 S.Ct. 2605, 2610-11 (1983); *see Oregon v. Bradshaw*, 103 S.Ct. 2830, 2837 n.3 (1983) (Powell, J., concurring). Criteria governing the content of such rules were set forth in *Illinois v. Andreas*. The bright-line rule advanced here satisfies these criteria.

In *Andreas*, this Court stated:

> In fashioning a standard [controlling the applicability of Fourth Amendment protections], we must be mindful of three Fourth Amendment principles. First, the standard should be workable for application by rank and file, trained police officers. See *New York v. Belton*, 453 U.S. 454, 458-460, 101 S.Ct. 2860,

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[3]Decisions from other jurisdictions reflect this same inconsistency, demonstrating further the need for this Court to decide upon a rule that can be applied uniformly by courts and the police. *Compare, e.g., Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978), *cert. denied*, 441 U.S. 947 (1979); *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), *cert. denied*, 450 U.S. 1026 (1981); *and Commonwealth v. Janek*, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976) *with State v. Brady*, Fla., 406 So.2d 1093 (1981), *cert. granted*, 456 U.S. 988 (1982); *State v. Byers*, La., 359 So.2d 84 (1978); *State v. Carter*, 54 Or. App. 852, 636 P.2d 460 (1981); *and State v. Walle*, 52 Or. App. 963, 630 P.2d 377 (1981).

2863-2864, 69 L.Ed.2d 768 (1981); *United States v. Ross*, 456 U.S. 798, 821, 102 S.Ct. 2157, 2170, 72 L.Ed.2d 572 (1982). Second, it should be reasonable; for example, it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed. Third, the standard should be objective, not dependent on the belief of individual police officers. See *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1879-1880, 20 L.Ed.2d 889 (1968).

103 S.Ct. at 3324. Petitioner's proposed bright-line rule, *viz.*, that any subjective expectation of privacy in fields or woods —even those that are fenced, posted, and secluded—is *per se* unreasonable for purposes of Fourth Amendment protection, is faithful to all three of these principles. First, the bright-line rule is workable because it can be applied quickly, easily, and with certainty by law enforcement officers whenever a search for evidence of criminal activity takes them into fields or woods. Second, the rule is reasonable because fields and woods are not places where human relations or activities demanding or creating the need for privacy ordinarily take place.[4] See Brief for Petitioner at 32-41.[5] And third, the rule is objective because its application does not

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[4]Respondent's contention that his woods cannot be equated with fields for purposes of *Hester*'s "open fields" doctrine (Brief for Respondent at 24-26) misses the point that under *Katz* any subjective expectation of privacy in either place is unreasonable for purposes of Fourth Amendment protection. See Brief for Petitioner at 38 n.12.

[5]Citing footnote 12 in *Rakas v. Illinois*, 439 U.S. 128, 144 (1978), Respondent contends that a property owner's right to exclude others is sufficient in itself to render legitimate a subjective privacy expectation in fields or woods. (Brief for Respondent at 20). In that same footnote this Court

depend upon the subjective evaluation by individual police officers as to whether a landowner's particular kind of fencing or posting has somehow conferred "reasonableness" for Fourth Amendment purposes on his subjective expectation of privacy.

No other alternative to the bright-line rule advanced here results in a workable, objective application of *Katz*'s "reasonable expectation of privacy" test to fields or woods. Any other alternative, even the "reasonable suspicion" standard posed by the United States in its Brief in *Oliver v. United States* (Brief for Respondent at 30-39, *Oliver v. United States*, No. 82-15), requires the police to engage in what can become fine and subtle subjective evaluations as to whether any particular kind of fencing, posting, or other exclusionary measure is substantial enough to bring the area within the protection of the Fourth Amendment.

III. PETITIONER'S BRIEF ON THE MERITS NEITHER CHANGES THE SUBSTANCE OF THE QUESTION PRESENTED FOR REVIEW IN THE PETITION FOR CERTIORARI NOR RAISES ADDITIONAL QUESTIONS.

Respondent contends that Petitioner's Brief does not comply with U.S. Sup. Ct. Rule 34.1(a) on the ground that Pe-

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stated, however, that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon. See ... *Hester v. United States*, 265 U.S. 57, 58-59 (1924)." Moreover, Respondent's contention here was raised in analogous form by Hester (Brief for Plaintiff at 4-5, 6-7, *Hester v. United States*, 265 U.S. 57 (1924)) and rejected by this Court. *Hester*, 265 U.S. at 58-59.

titioner's discussion of a bright-line rule changes the substance of the question presented for review in the petition for certiorari and raises additional questions. (Brief for Respondent at 45-46). The contention is without merit since the bright-line rule is proferred as the most desirable answer to the question presented in the petition, *viz.*, whether *Hester*'s "open fields" doctrine is applicable to the instant case.

Respondent's additional contention that "[i]t is too late" for Petitioner to advance its *per se* rule "as it was not raised ... in its appeal to the Maine Supreme Judicial Court" (Brief for Respondent at 45-46) is irrelevant since the critical fact is that the issue presented in the petition—to which the *per se* rule is Petitioner's answer—was also presented to and decided against Petitioner by the Maine Supreme Judicial Court. *Thornton*, 453 A.2d at 493-96; Pet. App All-A26; *cf. Illinois v. Gates*, 103 S.Ct. 2317, 2320-25 (1983) (issue of whether there should be a "good faith" exception to the exclusionary rule not decided since neither presented to nor decided by the state courts below). The mere fact that Petitioner did not argue for the bright-line rule, as such, in the Maine courts does not preclude Petitioner from now advancing the rule in this Court as "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Illinois v. Gates*, 103 S.Ct. at 2322 (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)).

CONCLUSION

The judgment of the Supreme Judicial Court of Maine in *State of Maine v. Richard Thornton*, 453 A.2d 489 (Me. 1982), should be reversed.

Respectfully submitted,

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